

APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Jacob R. Stein charged as Jack R. Stein, Appellant, vs., United States of America, Appellee. No. 10,694. Jun. 30, 1945.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Mathews, Stephens and Healy, Circuit Judges. Stephens, Circuit Judge.

An information containing seventeen counts charged defendant with violating War Production Board (WPB) General Preference Order M-9-a, promulgated pursuant to the Second War Powers Act, 50 U.S.C.A. App. § 633. Two of the counts (4 and 11) were dismissed; the jury found defendant not guilty as to count 1; he was convicted and sentenced as to the remaining fourteen. He appeals.

Each count charged that appellant on a certain date, the dates ranging from December 3, 1942, to March 16, 1943, did wilfully and unlawfully deliver a stated quantity of a wire mill product, namely insulated copper wire, to a purchaser; that said delivery was not made to fill an order bearing appropriate allocation classification, purchaser's symbol, and preference rating of AA-5 or higher, or bearing any allocation classification, purchaser's symbol, or preference rating whatsoever; that said delivery was not expressly authorized by the Director General for Operations; that appellant thereby wilfully diverted said wire mill product from the war effort of the United States.

Appellant was organizer and sales manager of a company which originally dealt in aluminum and aircraft

parts and subsequently handled salvage and other materials.

In September, 1942, appellant purchased an inventory of materials, including insulated copper wire, which was no longer usable by the owner, Lockheed Aircraft Corporation (Lockheed), in war or defense products. The materials were inventoried and catalogued, and in October a printed inventory was sent to various firms and government agencies, including WPB, Aircraft Scheduling Unit, and the Western Procurement District office of the Army Air Forces, which office was engaged in exercising control over and routing essential materials in the area. The engineering division of the Procurement District office advised appellant not to sell certain materials until he obtained written releases from that office. On several occasions thereafter telephonic requests for permission to sell were verbally answered in the affirmative; sales were made in accordance therewith, and no disapproving notice of any kind was received by appellant until the information herein was filed on October 4, 1943.

Following the practice just outlined appellant did not require any allocation classification, purchaser's symbol, or preference rating of AA-5 or higher on purchase orders.

The Second War Powers Act, Title III, § 2(a)(5), 50 U.S.C.A. App. § 633, 2(a)(5), defines offenses under the Act in the following terms: "Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a)

or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both." A violation of WPB Order M-9-a falls squarely within the quoted language. The definition fixes two requirements, the performing of a prohibited act and the performing of it wilfully.

"Wilfully" has been held to mean "deliberately and with a specific purpose to do the acts proscribed by Congress." *Hartzel v. United States*, 322 U. S. 680, 686 (1944). The Supreme Court has observed that "when used in a criminal statute it [wilfully] generally means an act done with a bad purpose * * *; without justifiable excuse * * *; stubbornly, obstinately, perversely * * *." The word is also employed to characterize a thing done without ground for believing it is lawful * * *, or conduct marked by careless disregard whether or not one has the right so to act * * *." *United States v. Murdock*, 290 U. S. 389, 394 (1933). Applying the accepted meaning of the word to the requirement of wilfulness as provided in the Second War Powers Act, the doing of a prohibited act deliberately and perversely by an accused person is necessary to the commission of the offense.

Of course, the judgment cannot be sustained unless substantial evidence supports the verdict. See discussion of the point in *Hartzel v. United States*, 322 U. S. 680, and *Craig v. United States*, 81 Fed. 2d 816, 827 (C. C. A.

9, 1936). We find no such evidence of appellant's wilful conduct in the record.

In negotiating the purchase of the copper wire and other materials between his company and Lockheed, appellant discussed priority regulations with Lockheed's representative. The latter testified to appellant's carefully expressed statement that he wished to comply with existing regulations of the WPB or of any other government agency. The last sentence of the purchase order declares: "It is also understood that we as buyers, will not under any consideration release any of this material to anyone not in a position to furnish proper priorities or conformance with all rules and regulations as prescribed by the War Production Board." The materials received from Lockheed were inventoried, and a printed catalogue was prepared and marked to various government agencies and civilians who might use the materials. An accompanying letter bore the statement: "Priority regulations must be complied with in full. We reserve the right to submit all orders to the War Production Board for approval before shipment." At the outset, then, appellant revealed no purpose to violate WPB regulations but instead a purpose to comply with them.

Subsequently when appellant sold the copper wire, the evidence is overwhelming that he entertained a genuine belief that sales made under permission from representatives of the Western Procurement District, Army Air Forces, sufficiently complied with priority requirements

applicable in the circumstances. One such representative, Mr. Tooker, on visiting appellant's plant before any of the sales were made, informed appellant that his office controlled certain materials, such as aluminum bar and certain aircraft instruments, and that clearance for sales of those items would have to be obtained from it. Appellant received a confirming letter from Major Zwick of that office, stating that a release in writing from that office should be obtained for the sale of strategic materials. Thereafter, appellant phoned Mr. Tooker's office several times asking for various releases, which were sometimes granted and sometimes refused. As to materials not considered strategic, appellant was told to use his own discretion. No written release was ever given for any of the various sales made. Mr. Tooker's testimony shows a practice of handling the matters by telephone. At no time was copper wire specifically adverted to in the mention of those items requiring official release.

Appellant was referred by Mr. Tooker to Mr. Chapman, a materials coordinator in the Western Procurement District office, and, upon being asked permission to dispose of copper wire, Chapman stated to appellant that if the wire had been purchased from Lockheed as obsolete or surplus, he had no jurisdiction over it, and appellant could do as he pleased with it, sell it to anyone he wanted to.

Major Vockrodt, chief of the redistribution and salvage section of the Western Procurement District office, testified that he had never purported to issue a release from

WPB orders, and Major Zwick declared that his office had no jurisdiction over the disposition of surplus materials. However, it does not appear that appellant was aware of the lack of jurisdiction of the Procurement District office, and he proceeded in accordance with his belief as to the intent of Mr. Chapman's statement—that he could do as he pleased with the copper wire.

In November of 1942 and before any of the copper wire sales were made, Mr. Sullivan, district manager of the WPB Redistribution Division, in specifically discussing the sale of steel and advertng to the denial of appellant's application to deal in allocated materials, requested that appellant refrain from dealing in steel, copper and aluminum until the appeal had been heard from. No mention of insulated copper wire was made, and, of course, the sale of obsolescent materials purchased from Lockheed would not have been directly mentioned since Mr. Sullivan knew nothing about that transaction at the time of the discussion. The appeal was subsequently denied.

Later and after the Lockheed purchase, appellant was told by Mr. Daniels, a WPB materials redistribution analyst that the Army Air Forces had complete control over surplus inventories in the hands of aircraft producers. Lockheed, as is well known, was one of the principal aircraft producers of the world. Daniels testified, however, that he had nothing to do with the sale of such materials. He testified that he had not discussed with appellant the matter of permission to sell the surplus materials.

On March 17, 1943, subsequent to the last sale charged in the indictment, a WPB investigator visited appellant's

plant and examined appellant's books and records. Appellant remarked at that time: "We do not feel very kindly to the War Production Board, and we have decided that if they will let us alone, we will let them alone." The investigator was asked whether it was all right to continue selling copper wire without preference rated orders; he replied that it was not his function to make a statement in reply to such a question. Further copper wire sales were made thereafter.

It should be emphasized that the copper wire was disposed of openly with no attempt to secrecy and that complete records open to government officials at all times were kept of all sales.

We have mentioned every piece of evidence which might in any way suggest willingness on appellant's part to sell in violation of WPB regulations. We think the evidence reveals the situation where a man is confronted by confusing and overlapping jurisdictions. It describes a man who from discussions with various officials in good faith assumes that the Army Air Forces Procurement District is the controlling authority over the materials in his possession and who thereafter in good faith follows the procedure he understands is the proper one of clearing sales through that office. The evidence, if there is any, from which an intentional or deliberate disregard of WPB regulations may be inferred is too tenuous to be held substantial.

Reversed.

(Endorsed.) Opinion. Filed Jun. 30, 1945. Paul P. O'Brien, Clerk.

APPENDIX B.

Pertinent provisions of Second War Powers Act, 50 U.S.C.A. 1944 Appendix Sec. 633: (Subsection (a) of Sec. 2 of Act of June 28, 1940; 54 Stat. 676) Title III—Priorities Power—of the Second War Powers Act, 1942, as amended, can be summarized as covering certain general subjects. It has to do with powers and authority granted to the executive in aid of the effective prosecution of the war, and deals with (1) Contracts for construction of vessels and other contracts; (2) Power to determine priorities and allocate materials and issue regulations and orders in aid thereof; (3) Record keeping requirements; (4) Compelling attendance of witnesses, subpoenas, etc.; (5) Criminal sanction; (6) Jurisdiction of courts for civil or criminal actions; (7) Giving to persons whose compliance with regulations may result in default under any contract, and excuse from liability due to such default; (8) Authority of President to delegate his powers.

It provides, relative to punishment for violation of any rule, regulation or order promulgated pursuant thereto, as follows:

“(5) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.”

APPENDIX C.

War Production Board.

Part 933—Copper

[General Preference Order M-9-a as Amended October 30, 1942.]

Whereas the national defense requirements have created a shortage of copper, copper base alloys and products thereof, as hereinafter defined, for defense, for private account, and for export, and it is necessary in public interest and to promote the defense of the United States, to conserve the supply and direct the distribution thereof:

Now, therefore, it is hereby ordered:

§933.2 *General Preference Order M-9-a—(a) Definitions.* For the purpose of this order:

(1) "Copper" means copper metal which has been refined by any process of electrolysis or fire refining to a grade and in a form suitable for fabrication, such as cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner.

(2) "Copper base alloy" means any alloy in the composition of which the percentage of copper metal by weight equals or exceeds 40% of the total weight of the alloy.

(3) "Refiner" means any person who produces copper, as hereinbefore defined from copper-bearing material or scrap by any process of electrolysis or fire refining; "re-

finer" also includes any person who has such copper produced for him under toll agreement.

(4) "Dealer" means one who receives physical delivery of copper and sells or holds the same for sale without change in form.

(5) "Brass mill product" means sheet, wire, rod or tube made from copper or copper base alloy.

(6) "Wire mill product" means bare or insulated wire or cable for electrical conduction made from copper or copper base alloy.

(b) *Allocation of copper*—(1) *Deliveries of copper by dealers or refiners.* No delivery of copper shall be made by any dealer or refiner except upon presentation by the person requesting the delivery of an allocation certificate duly issued by the Director General for Operations (hereinafter called the Director); except that notwithstanding the foregoing, copper of foreign origin imported under bond or drawback agreement may be reexported by a refiner pursuant to an export license duly issued by the Office of Export Control, Board of Economic Warfare.

(2) *Applications for allocations.* All persons who require copper shall make application on Form PD-59 to the Copper Branch, War Production Board, for allocation certificates entitling them to specified amounts of copper to be delivered to them by refiners or dealers.

(3) *Basis of allocation.* Allocation of copper will be made by the Director to assure the satisfaction of the most

essential requirements. After the satisfaction of such requirements, the residual supply may be allocated by the Director for other necessary uses to the extent possible.

(4) *Acceptance of delivery.* No person shall accept the delivery of any copper if he has reason to believe such delivery would be in violation of this order.

(c) *Deliveries of brass mill products or wire mill products.* Except as expressly authorized or directed by the Director:

(1) No brass mill or wire mill shall fill any order which has not been approved on a Form PD-59D.

(2) No industrial supplier, mill supplier, plumbing supply house or other person engaged in the business of distributing brass mill or wire mill products to industry or trade, shall deliver or cause to be delivered any brass mill product or wire mill product, unless such delivery is made to fill an order bearing the appropriate allocation classification and purchaser's symbol (pursuant to Priorities Regulation No. 10) and bearing a preference rating of AA-5 or higher.

(5) No person shall accept the delivery of any brass mill product or wire mill product if he has reason to believe such delivery would be in violation of this order.

(d) *Deliveries of foundry products or copper base alloy ingots.* Deliveries of foundry products and copper base alloy ingots shall be made only in accordance with the provisions of Supplementary Copper Order No. M-9-b.

(e) *Toll agreements.* (1) No person shall process any copper, brass mill product, or wire mill product acquired prior to July 1, 1942, under any existing or future toll agreement, conversion agreement, or other form of agreement by which title remains vested in a person other than the one processing the material, or which agreement is contingent upon repurchase of such materials in any quantities equivalent or otherwise by the person delivering the material, unless and until such an agreement shall have been approved by the Director. Any person desiring to have such an agreement approved must file with the War Production Board, a statement setting forth the names of the parties to such agreement, the material involved as to kind and grade (except copper scrap for which provision is made under Supplementary Copper Order No. M-9-b), the form of the same, the estimated tonnage involved, the estimated rate of delivery, the length of time such agreement or other similar agreement has been in force, the duration of the agreement, the purpose for which the copper, copper base alloy or copper product is to be used, and any other pertinent data that would justify such approval.

(2) All refiners who are parties to toll agreements for the refining of copper (who have not already filed the information with the Director) must file with the War Production Board, a statement setting forth the names of the parties to such agreement, the material involved, whether blister, scrap or in other form, the estimated tonnage involved, the estimated rate of delivery, and the duration

of the contract. A like statement must be filed with reference to any new agreement or amendment to existing or new agreements within ten days after the effective date of such new agreement or amendment respectively.

(f) *Addressing of communications.* All applications, statements, or other communications filed pursuant to this order or concerning the subject matter hereof should be addressed War Production Board, Ref: M-9-a, Washington, D. C.

(g) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(h) *Effective date.* This order shall take effect August 1, 1942.

(P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024, 7 F.R. 329; E.O. 940, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

APPENDIX D.

Chart showing correlation between (a) Dates of alleged offenses, (b) Amended information, (c) Jury charge and (d) M-9-a.

Date	The Amended Information	The Charge to the Jury	The Law
Prior to Nov. 5 1942	(No offenses are charged against Stein)		Deliveries of copper wire pursuant to Order M-9-a may be made to fill an order bearing: 1. Appropriate allocation classification.) pursuant 2. Purchaser's symbol.) to 3. Preference rating AA-5 or higher.
Nov. 5 1942 to Mar. 3, 1943	FIRST 14 COUNTS Deliveries were not made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher.	Delivery cannot be made unless it is made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher. [R. 277]	Deliveries of copper wire may be made to fill an order bearing: 1. Appropriate allocation classification.) pursuant 2. Purchaser's symbol.) to 3. Preference rating of AA-5 or higher. (Note: on Nov. 5, 1942, PR. 10 was revoked)
Mar. 3, 1943 and thereafter	LAST 3 COUNTS Deliveries were not made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher.	Delivery cannot be made unless it is made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher. [R. 277]	Deliveries of copper wire may be made to fill an order: 1. As permitted by CMP Regulation #4. (Note: CMP, among other things, established an entirely new system of allotment numbers. These numbers are entirely different from anything theretofore)

APPENDIX E.

The Background of Regulations: From PRP to CMP.

The revocation of Priorities Regulation No. 10 in November 1942, and the amendment to General Preference Order M-9-a in March 1943, evidence two stages in the War Production Board's switch from what was the "Production Requirements Plan" to the "Controlled Materials Plan." Priorities Regulation No. 10 was a regulation apparently made necessary by the Production Requirements Plan to insure the fair and efficient working of priorities and allocations. It was made unnecessary by the Controlled Materials Plan.

An understanding of the nature of the Production Requirements Plan and its defect is a prerequisite to understanding the reason why the Controlled Materials Plan was inaugurated by the War Production Board. An understanding of these plans is necessary in order to give meaning to the requirement for an allocation classification and a purchaser's symbol, the destruction of that requirement; the requirement for a preference rating, the destruction of that requirement; and the substitution of the Controlled Materials Plan.

As succinct a statement as has been found of the Production Requirements Plan, its defect, and the Controlled Materials Plan, is taken from, 3 Business Control Coordinator 24,006:

"R. 13. Production Requirements Plan. The first tentative step in these directions [rationalization and control of production and distribution of war materials] was the Production Requirements Plan, which attempted to allot balanced quantities of different materials to every important metal-using plant for three months in advance. However, P.R.P. suf-

ferred from one basic defect which soon proved fatal—it attempted to allot materials without assuming control over production programs and schedules.

“Under P.R.P., a prime contractor could never be sure that his subs were getting all the material they required to complete the parts he needed to make full use of his materials. A manufacturer of an urgent munitions item might have been cut back only 20%, or not at all—but four of his important sub-contractors might have been scaled down 40% or 60% on the materials they requested. The inevitable results were tanks without treads, planes without propellers and colossal wastes of scarce materials tied up in unfinished end products and parts. Hardly six months after it had been placed in operation P.R.P. had to give way to the Controlled Materials Plan, announced in November, 1942.

“R. 14. Controlled Materials Plan. CMP began as an attempt to adjust programs of the several claimants on essential production in terms of the expected supply of steel, copper and aluminum. The assumption was that a war production program scaled down so as not to exceed the supply of any one of these basic metals would not seriously overload the supply of other materials. Moreover, by making vertical allotments of these metals through precisely the same channels used in placing contracts and setting production schedules, some coordination between control of materials and control of schedules could be achieved. Under CMP, contract, order, schedule and allotment can all be tied together.”

The Production Requirements Plan was designed to work, in part, as follows: Each purchaser of materials

coming under the PRP was to state on his purchase order the allocation classification of the materials which he purchased and his purchaser's symbol. A copy of each of such purchase order was to be sent to the proper government office and there analyzed and classified. Quantities of materials needed in industry were thus to be determined so that the War Production Board could know the extent of the requirements for particular materials in industry.

The Controlled Materials Plan, announced in November 1942, operates under a system of claimant agencies. These claimant agencies are each a government unit and include, among others, the Army Air Force, which is represented by the Aircraft Scheduling Unit. These agencies are war procurement agencies and are advised of the needs for materials from their various prime contractors. Materials are allotted by the Requirements Committee, to each of the Claimant Agencies, and each Claimant Agency has the primary responsibility for each program of allotment. (C. C. H. War Law Serv., Par. 33,023.)

Steel, copper and aluminum were the first three materials to come within the CMP. Whenever materials come under CMP delivery can be made by a person in possession of the materials without a preference rating. (C.C.H. War Law Serv., Par. 33,031.)

Under PRP each purchaser sent to the proper government office one or more copies of his purchase order containing an appropriate allocation classification and purchaser's symbol. Under CMP the needs of consumers of materials is ascertained through a system of Bills of Materials. CMP abolished allocation classifications and inaugurated a system of allotment numbers instead.

APPENDIX F.

PRIORITIES REGULATION 13.

PART 944—REGULATIONS APPLICABLE TO THE OPERATION OF THE PRIORITIES SYSTEM.

[Priorities Regulation 13 as Amended to September
23, 1942]

Special Sales of Idle or Frozen Materials.

§944.34. *Priorities Regulation 13*¹—(a) *Purpose*. The purpose of this regulation is to provide uniform rules governing special sales of idle or excess materials by persons who are not regularly engaged in the business of selling such materials, including distress and liquidation sales and sales by persons who, by reason of the effect of priority orders or for other reasons, cannot use such materials in the regular course of their business. This regulation does not authorize receipt or use of any material by any person in violation of any inventory, quota or use restrictions imposed by any order or regulation.

(b) *Definitions*: For the purposes of this regulation:

(1) "Sale" of a material includes any public or private sale, auction sale, sale upon foreclosure of any lien or mortgage, or delivery of such material in exchange for money or for any other material and the sale of any warehouse receipt, bill of lading or other document evidencing an interest in such material, but does not include the pledge or mortgage or other creation of any lien upon such material or the transfer of possession of such material without any transfer of title.

¹7 F.R. 5167, 5604.

(2) "Special sale" means any sale except that:

(i) A sale of any material by any person who regularly in the course of his business sells such material in the same form is not a special sale. For the purpose of this subparagraph, the following classes of sales shall not be deemed to be made by a person who regularly sells material in the course of his business; a sale by any receiver trustee in bankruptcy, public official or other person acting in a fiduciary or representative capacity (except when made in the course of carrying on the business of an insolvent or bankrupt person or other person whose business is in the hands of such fiduciary or representatives), or any other sale made in the course of liquidating a business or the assets of a business;

(ii) A sale of any material which is being rationed at the retail level by the Office of Price Administration or any other governmental agency is not a special sale;

(iii) A sale of any tool, machinery, or other assembled commercial, industrial, production, agricultural, or household equipment is not a special sale;

(iv) A sale of material which is in the form in which it is used by ultimate consumers thereof and which does not require, in order to be so used, to be further processed or assembled with other materials or made part of a building or other structure is not a special sale;

(v) A sale of foodstuffs, medicines, and other materials for internal human consumption is not a special sale.

(3) "Material" means any commodity, equipment, accessory, part, assembly or product of any kind.

(4) "War materials" means any material consisting in whole or in substantial part of one or more materials listed in Schedule A attached.

(5) "Person" means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons, whether incorporated or not.

(6) "Single lot" of material means all material of the same size and specification at the same location.

(7) "Director" means the Director General for Operations or the Director of Industry Operations of the War Production Board or the Director of Priorities of the Office of Production Management.

(c) *Permitted special sales.* (1) Subject to paragraph (e) of this regulation, any person may make a special sale of any material other than a war material without restriction.

(2) Subject to paragraph (e) of this regulation, any person may make a special sale of any war material if the sale falls within one of the following categories, and no person may make any special sale of any war material if such sale does not fall within one of the following categories:

(i) A sale to any of the following governmental departments or agencies or to any person buying for the account of such departments or agencies: Maritime Commission, Navy Department, War Department, Board of Economic Warfare, Commodity Credit Corporation, Defense Supplies Corporation, Metals Reserve Company, Rubber Reserve Company and any other corporation organized under section 5 (d) of the Reconstruction Finance Corporation Act as amended; or

(ii) A sale pursuant to a specific authorization of the Director naming the seller and identifying the particular sale to be made; or

(iii) A sale of a single lot of war material (other than a war material listed in Schedule B attached) at an aggregate price of less than \$100. This exception does not permit the dividing of a single lot having a value of over \$100 into smaller lots and selling such smaller lots for less than \$100 under this subparagraph.

(iv) A sale to any person falling within a class indicated on Schedule A attached as being a class to whom the particular war material may be sold: *Provided*, That when any alloy, compound, mixture, or product is not listed as such on Schedule A and contains a significant amount of more than one war material, the sale shall be made only to a person to whom all such contained war materials may be sold. A sale of a plated item shall be governed by the basic material, disregarding the plating.

(3) In addition to the provisions of paragraph (c) (2) above, any person may, subject to paragraph (e) of this regulation, make a special sale of any war material to another person engaged in the same business as the seller if an order or other action of the Director applicable generally to persons engaged in such business expressly permits such a sale.

(d) *Intra-company transfers.* Any person may transfer, otherwise than by sale, any material to another department, branch division or section of his business or to a wholly owned subsidiary or affiliate or to another person under common ownership or control, provided such transfer would be a special sale if made for a consideration and such special sale would have been permitted under this regulation.

(e) *Effect on other orders and regulations.* (1) Any sale which is not a special sale shall remain subject to the provisions of all applicable orders and regulations.

(2) The provisions of this regulation shall control all special sales although inconsistent with any order or regulation of the Director heretofore issued and although inconsistent with any order or regulation of the Director hereafter issued unless such order or regulation expressly provides to the contrary. Notwithstanding any provision of any such order or regulation which permits such sale, no special sale shall be made if forbidden by the provisions of this regulation; and any special sale permitted by the provisions of this regulation may be made, and deliveries thereunder accepted by the buyer, despite any provision of any such order or regulation forbidding the same except that:

(i) Nothing in this regulation shall affect any provision contained in any order or regulation of the Director which imposes any quota or other limitation on the amount any buyer may purchase, receive or produce, or which imposes any limitations on the amount of inventory of any person or any restrictions upon the use of any material; and

(ii) This regulation shall not affect any provision of any applicable order or regulation of the Director requiring a buyer to make any reports or to furnish any information in connection with a purchase; and

(iii) No seller shall make any special sale if he knows or has reason to believe that the purchase or acceptance or delivery by the buyer would violate any inventory or quota restrictions imposed on the buyer by any order or regulation or that the buyer is acquiring the material for a use which would be in violation of any order or regulation.

(f) *Records.* Any person making any special sale must maintain at his regular place of business all documents,

including purchase orders and preference rating orders and certificates, upon which he relies as entitling him to make such sale. Such records shall be kept segregated and available for inspection by representatives of the War Production Board, or filed in such manner that they can be readily segregated and made available for such inspection.

(P. D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024, 7 F.R. 329; E.O. 9040, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 23d day of September, 1942.

ERNEST KANZLER,
Director General for Operations.

SCHEDULE A¹

Explanatory Note: This schedule relates only to special sales made under paragraph (c) (2) (iv.) of this regulation. Any purchaser of material through a special sale must comply with all inventory, quota, and use restrictions imposed by all other orders and regulations.

When an alloyed material, or a physically or chemically compounded material, is shown in this table, the conditions that govern the sale of the alloyed or compounded material are those shown for the alloy or compound and not those shown for the constituent elements or parts. For example, the conditions under which stain-

¹Schedule A as it appeared on September 24, 1942 issue of the Federal Register is omitted. In lieu thereof Amendment No. 1 to Schedule A as published in Federal Register November 18, 1942 is reprinted as Appendix F, continued.

less steel may be sold are those shown for the war material "Stainless Steel" and not those shown for "Chromium" or "Nickel" or "Steel". When any alloy, compound, mixture, or product is not listed as such on Schedule A and contains a significant amount of more than one war material, the sale shall be made only to a person to whom all such contained war materials may be sold, Plated items are governed by the basic material, disregarding the plating.

The word "No" appearing in any column in this schedule means that a holder may not sell the particular war material to any person in the class to which that column applies unless the sale is otherwise permitted by this regulation.

The letters "PR" means Preference Rating, and wherever they appear in any column, means that the holder may sell the particular war material to any person in the class to which that column applies, but *only* provided that such person places with the holder an order for the material bearing a duly applied or extended preference rating equal to or higher than the rating shown immediately after the letters "PR". For example, "PR A-1-k", which appears opposite the war material "Nickel" in the column headed "Users permitted to buy for an authorized use" means that the holder may sell to any user who places an order for a product containing nickel if that order bears a duly applied or extended preference rating of A-1-k or higher.

The letters "W. O. P." means "Without Preference Rating" and wherever they appear in any column mean that the holder may sell the particular material to any person in the class to which that column applies without any preference rating from the buyer.

APPENDIX F, Continued.

Amendment to Priorities Regulation 13.

Federal Register, Wednesday, November 18, 1942
TITLE 32—NATIONAL DEFENSE
Chapter IX—War Production Board

Subchapter B—Director General for Operations

PART 944—REGULATIONS APPLICABLE TO THE OPERATION OF THE PRIORITIES SYSTEM
[Amendment 1 to Schedule A to Priorities Regulation 13 as Amended to Sept. 23, 1942]

Schedule A¹ attached to Priorities Regulation No. 13 (§944.34) is hereby amended with respect to the materials listed below as follows:

AMENDMENT NO. 1 TO SCHEDULE A

Classes of buyers to whom special sales of war materials
may be made in accordance with this schedule, subject
to paragraph (e) (2) of this regulation

Persons who pro- duce ma- terial in the form in which it was purchased by holder	Users per- mitted to buy for an authorized use	Reproces- sors who are authorized to buy	Whole- sale deal- ers who sell the material in the form held by holder	Scrap dealers who are author- ized to buy
----------------------------------------------------------------------------------------------------------	------------------------------------------------------------	---------------------------------------------------	------------------------------------------------------------------------------------------------	----------------------------------------------------------

War Material	(1)	(2)	(3)	(4)	(5)	(6)	Remarks	(7)
Copper: ¹								
Copper ingots and refinery shapes.	W.O.P.	No.	X	W.O.P.*	No.		*Only to persons holding allocation certificates or specific authorization to buy.	
Copper base alloy ingots (40% or more copper by weight).	W.O.P.	No.	X	W.O.P.*	No.			
Brass and wire mill products.	W.O.P.	PR AA-5	X	W.O.P.*	No.		This note applies only to places where asterisk appears.	
Insulated wire	W.O.P.	PR AA-5	X	W.O.P.	No.			
Copper and copper base alloy foundry products.	W.O.P.	PR AA-5	X	W.O.P.*	No.			
Brass mill scrap	W.O.P.**	No.	X	X	W.O.P.		**Only to brass mills.	
Other scrap	W.O.P.*	No.	X	X	W.O.P.			
Copper chemicals (see chemicals).								

Steels:³

Rails and track accessories.*	No.	No.	No.	No.	No.	*See L-88.
Tin plate, terne plate and tin mill black plate.*	W.O.P.	PRA-10	X	No.	No.	*Subject to limitations of M-21-e.
All other carbon and alloy steels.	W.O.P.	PRAA-5	PRAA-5	PRAA-5	No.	
Tin and terne plate scrap	W.O.P.	No.	W.O.P.	X	W.O.P.	
Other carbon steel scrap	W.O.P.	W.O.P.	W.O.P.	X	W.O.P.	
Alloy steel scrap	W.O.P.	No.	No.	X	W.O.P.	

Terne plate (see Steels).

Terne plate scrap (see Steels).

Tin mill black plate (see Steels).

Tin plate (see Steels).

Tin plate scrap (see Steels).

Cotton, American extra staple.* W.O.P. W.O.P. X W.O.P. No. *As defined in M-197. Use certification required.

Cotton, Egyptian* W.O.P. W.O.P. X W.O.P. No. *As defined in M-117. Use certification required.

Cottonseed, XSP W.O.P. W.O.P. X W.O.P. W.O.P.

¹In the case of all sales made under this regulation of copper or copper base alloy items which have previously been reported to War Production Board, Care Copper Recovery Corporation, 200 Madison Avenue, New York, New York, the seller must send a copy of the invoice to that address.

²In the case of all sales made under this regulation of steel or steel base alloy items which have previously been reported to War Production Board, Care Steel Recovery Corporation, 5835 Baum Boulevard, Pittsburgh, Pennsylvania, the seller must send a copy of the invoice to that address.

[F.R. Doc. 42-12012; Filed, November 17, 1942; 10:45 a.m.]

(P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024; 7 F.R. 329; E.O. 9040, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 17th day of November 1942.

ERNEST KANZLER,
Director General for Operations.

APPENDIX G.

Discussions of Manifest Error and Injustice of Court of Appeals Opinion In This Case.

(NOTE: There is here discussed the opinion of the Circuit Court of Appeals which is sought to be reviewed. Certain manifest errors appear therein in so far as the decision of this case is concerned. To permit a judgment of imprisonment and the fine assessed to stand against petitioner based on the reasons assigned in the opinion, would constitute a form of judicial injustice. There is not presented here the law and factual arguments presented to the Circuit Court of Appeals. This was done at length in briefs filed upon the appeal and in connection with the rehearing. There is no attempt here to argue all of the points raised which were made to the Circuit Court. Our petition here is premised upon the constitutional grounds which have been presented in the body of the petition. It is clear, however, that the only rationalization which can be made of the Circuit Court of Appeals opinion is: That court too was unable to understand and properly apply the manifold orders and regulations of the War Production Board to the facts of the instant case — yet appellant Stein was convicted of a crime and is subject to a judgment of imprisonment and a heavy fine by reason of his inability to know and understand and obey the same orders and regulations.)

A. WITH RESPECT TO THE REGULATIONS.

(1) Effect of Revocation of Priorities Regulation No. 10 upon General Preference Order M-9-a.

The Circuit Court asserts that it is appellant's position that the whole of M-9-a was impliedly repealed by the revocation of Priorities Regulation No. 10. While this is a position of the petitioner, it is not the only position of petitioner. In fact, the petitioner more strongly urges that the revocation of PR 10 made M-9-a uncertain and ambiguous. Leaving aside whether the revocation of PR 10 constituted a repeal of M-9-a, the revocation did make M-9-a uncertain and ambiguous so that M-9-a could not support a criminal conviction. The *uncertainty* engendered in M-9-a by the revocation of PR 10 was not mentioned or considered by the Second Opinion.

(2) The Class of Persons problem.

The Second Opinion discusses Section 933.2(b)(1) of General Preference Order M-9-a and holds that Stein could not be a dealer within the meaning of that section because this prosecution did not involve his sale of "copper." The Opinion, however, does not compare section (b)(1) of M-9-a with section (c)(2) of M-9-a with a view to determining the class of persons governed. We contend and have contended that it is perhaps impossible to determine the class of persons regulated by these two sections. In section (b)(1) the word "dealer" is used to describe the class of persons governed. Dealer is defined to mean "one who receives physical delivery of copper and sells or holds the same for sale without change in form." Whereas, in section (c)(2) the class of persons is described by the words "Industrial supplier, mill supplier, plumbing supplier, or other persons engaged in

the business of distributing brass mill or wire mill products to industry or trade." The ambiguity arises because the copper wire made the subject of this prosecution was a product which Stein had not theretofore been engaged in the business of selling or distributing.

We urge that Stein was not a "person engaged in the business of distributing brass mill or wire mill products to industry or trade," because the distribution of brass mill or wire mill products was not the business in which he was engaged. If section (c)(2) of M-9-a were meant to govern one who merely sells what he receives, then M-9-a would have used the word "dealer" to include wire mill products. There must have been some reason why the War Production Board used the word "dealer" to describe the activities coming under section (b)(1) and did not use the word "dealer" to describe the activities coming under section (c)(2). The Second Opinion fails to explain the difference between use of the word "dealer" in section (b)(1) and the use of words other than "dealer" in section (c)(2).

(3) Application of Priorities Regulation No. 13.

Priorities Regulation No. 13 governs special sales. The Second Opinion is correct in so far as it emphasizes that PR 13 governs *special* sales.

A special sale is a sale by a person "not regularly engaged in the business of selling *such* materials." Insulated copper wire is one of the materials regulated by PR 13. The Second Opinion fails to give due credence to the word "such" as applied in this prosecution. The word "such" would mean insulated copper wire, so that a special sale would be a sale by a person "not regularly engaged in the business of selling" insulated copper wire.

Stein could well be precisely the kind of person who could make a special sale of insulated copper wire because there was no evidence in the record that he was a person regularly engaged in the business of selling insulated copper wire. In fact, the record is to the contrary and shows that Stein had never before purchased or handled insulated copper wire, and there is no evidence in the record that after he disposed of the insulated copper wire which he purchased from Lockheed, he ever again purchased or sold that commodity.

Special Sales under PR 13 could be made in certain circumstances without any priority. At the time the sales were made by Stein, the circumstances were in two classes.

One, sales made to "wholesale dealers who sell the material in the form held by holder." The largest sale made by Stein for which he was prosecuted, was that contained in Count 7 of the Amended Information [R. 18]. This was the delivery of 100,000 ft. of copper wire to Troy Radio & Television Company, which in turn sold the material in the same form to Seattle Radio Supply, Inc. [R. 104, 252]. Therefore, the sale by Stein to Troy Radio & Television Company was a sale to a wholesale dealer which sold the material to another in the same form held by holder. Accordingly, that sale comes within that portion of PR 13 wherein a Special Sale can be made without any priority.

Two, sales in single lots of less than \$100.00 may be made without priority under PR 13.

The War Production Board Release No. WPB-1489, issued July 7, 1942 (C.C.H., War Law Serv., Par. 3092.10) read in part:

“5. Q. To whom can ‘Special Sales’ of ‘War Materials’ be made? A. (d) in individual lots of an aggregate price of less than \$100.00.”

Three of the Counts of the Amended Information were, as the evidence shows, for sales of less than \$100.00. [As to Count V, see Exhibit 16, the price of \$60.00; as to Count VI, see Exhibit 17, the price of \$60.00; as to Count IX, see R. 107, the price of \$77.25.]

(4) Application of Priorities Regulation No. 1.

The Second Opinion dismisses consideration of PR 1 by quoting from PR 1 the language that PR 1 applies only in the event that another regulation is not applicable. But the Second Opinion overlooks the ambiguity present in M-9-a. We urge that where other regulations are uncertain in their application, then it is reasonable for a business man to assume that he is governed by PR 1. That regulation read in part as follows:

“‘Compulsory acceptance of defense and other rated orders. Defense Orders for any material and all other purchase orders bearing preference ratings, including both A and B ratings (hereinafter called ‘other rated orders’) must be accepted and filled in preference to any other contracts or purchase orders for such material, . . .’ (Sec. 944.2, Priorities Regulation No. 1, 6 FR 6681, December 24, 1941.)”

The evidence on some of the Counts reveals that the defendant Stein sold to purchasers who were operating under a preference rating of A-10, or were purchasing as a Defense Order [As to Count II, R. 99; as to Count III, R. 100; as to Count V, R. 101; as to Count VI, R. 101; as to Count XII, R. 108], and hence may be compulsory orders under Priorities Regulation No. 1."

B. WITH RESPECT TO THE JURY INSTRUCTIONS.

The Second Opinion is inconsistent within itself. The charge instructed the jury that the delivery of a wire mill product should not be made unless the three elements of appropriate allocation classification, purchaser's symbol, and preference rating of AA-5 or higher, are endorsed on the purchase order. [R. 277.]

The Second Opinion noted that PR 10 which prescribed the appropriate allocation classification and purchaser's symbol, was revoked prior to the time when any of the deliveries of insulated copper wire involved in the prosecution occurred.

The Second Opinion makes the following contradictory statements:

"The court instructed the jury as to section 933.2(c)(2) applicable to the case without noticing the change made by the elimination of the regulation."

"The Judge correctly instructed in regard to law applying to all of the counts excepting . . ."
Counts 15, 16 and 17.

We urge that the trial court's instruction to the jury was not correct on any of the counts because the instruction failed to notice "the change made by the elimination of the regulation," Priorities Regulation No. 10.

The Second Opinion asserts that the failure to note the change made by PR 10 could not possibly have been prejudicial to appellant. We urge that the failure to note the change in PR 10 was constitutionally hurtful prejudice to Stein because, first, the jury charge informed the jury as to elements of a crime not present in the law, and, second, it clouded the issue of wilfulness since it may well make a substantial difference in determining criminal intent whether an alleged violator failed to perform in three respects or only in one.

C. THE INFORMATION.

The Second Opinion failed to discuss in any respect whether, in the light of the revocation of PR 10, the Amended Information was competent to support a conviction. In each of the Counts of the Amended Information, Stein was charged with making deliveries of insulated copper wire and that each of the deliveries was not made "*to fill an order bearing the appropriate allocation classification and purchaser's symbol* and bearing a preference rating of AA-5 or higher . . ." In view of the revocation of PR 10, there was no legal existence to "appropriate allocation classifications" or "purchasers' symbols" during any of the times when deliveries of insulated copper wire were made by Stein.

D. THE PROOF OF WILFULNESS.

The Second Opinion errs in failing to hold that affirmative proof of guilty intent is required to sustain a criminal conviction for violation of the Second War Powers Act. The Second Opinion holds that because there was no compelling inference from the testimony that Stein did not wilfully violate the law, he is therefore guilty.

But the law with respect to wilfulness is more aptly stated in the First Opinion—to prove a wilful violation of a WPB order there must be affirmative proof not only that the defendant performed the prohibited act but that he performed it wilfully. The Second Opinion nowhere asserts that Stein did the prohibited acts deliberately and perversely.

It is important to note that when the Circuit Court of Appeals properly stated the law with respect to the proof of wilfulness, as it did in the First Opinion, it found that the judgment of conviction should be reversed.

E. INCONSISTENT VERDICTS.

While the majority opinion in *Dunn v. U. S.*, 284 U. S. 390, holds that consistency in the verdict is not necessary, we urge that a re-examination of the holding in the *Dunn* case is appropriate. In the instant case, the single issue of fact presented to the jury was the issue of the defendant's wilfulness. The delivery of insulated copper wire was, in each of the Counts, either stipulated to by Stein or not put in issue.

In the *Dunn* case, the petitioner was indicted in three Counts for different types of offenses. These offenses were "first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second, for unlawful possession of intoxicating liquor, and third, for the unlawful sale of such liquor." (p. 391.)

The jury acquitted the defendant on the second and third counts and found him guilty on the first. There

was not before the jury in the Dunn case a single issue as to the three counts. There is in the instant case, however, a single issue of fact, that of wilfulness. The deliveries by Stein of insulated copper wire were in each Count either stipulated or not contested.

Mr. Justice Butler wrote a lengthy dissenting opinion in the Dunn case. He stated the rule to be "that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other the defendant is entitled to a new trial." (p. 406.)

We urge that the Dunn case should be reconsidered and the rule respecting inconsistent verdicts modified to hold that where there is a single issue of fact in an indictment or information charging the same offenses in different counts and the jury acquits as to one and convicts as to the other counts, then the defendant should be entitled to a new trial.

Service of the within and receipt of a copy
thereof is hereby admitted this.....day of
March, A. D. 1946

